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Charles Robert Norberg

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Inter-American Commercial Arbitration — Unicorn or Beast of Burden?

Charles Robert Norberg†

Twenty years ago Donald B. Straus, then the President of the American Arbitration Association (AAA) gave a speech entitled, "Inter-American Commercial Arbitration — Unicorn or Beast of Burden?"¹ Upon assuming his responsibilities a few years earlier, he had found within the AAA premises an office housing the secretariat of the Inter-American Commercial Arbitration Commission (IACAC) from which attempts were being made to maintain a system for arbitrating inter-American commercial disputes. There was little evidence that there existed a viable, effective, and efficient system for resolving these disputes.

At the time Donald B. Straus made his speech, the framework necessary to create uniformity in the law and practice of international commercial arbitration did not exist in the Western Hemisphere. Twenty years ago, the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)² had little impact in the Americas; even the United States did not ratify the New York Convention until 1970.³ The requisite framework for an inter-

† Director-General, Inter-American Commercial Arbitration Commission. B.S., Cornell University; M.A. University of Pennsylvania; LL.B., Harvard Univ.. U.S. Delegate to the OAS Specialized Inter-American Conference on Private International Law, Panama, 1975. Member, Pennsylvania Bar, District of Columbia Bar.

1. Address before the Section of Corporation, Banking and Business Law, American Bar Association, August 10, 1965, on file in the Eastman Library of the American Arbitration Association, New York City.

2. *Opened for signature* June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 [hereinafter cited as New York Convention].

3. See 9 U.S.C. §§ 201-208 (1982). See generally A. J. VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958* (1981) (emphasizing the need for certainty in arbitral procedure).

In addition to the United States, the New York Convention has been ratified by

American commercial arbitration system was not created until 1975, when the Inter-American Convention on International Commercial Arbitration (Inter-American Convention) was promulgated.⁴ The Inter-American Convention has been ratified by Chile, Costa Rica, El Salvador, Honduras, Mexico, Panama, Paraguay, and Uruguay.⁵ Although the United States has not yet ratified the Inter-American Convention,⁶ President Ronald Reagan sent it to the Senate on June 13, 1981, with the recommendation that the Senate give its advice and consent to ratification.⁷

The Inter-American Convention is a product of a decision to reexamine, among other things, the AAA's relationship with the IACAC in order to explore a viable system for resolving commercial disputes in the Western Hemisphere. In recent years, global interest in the international arbitration process has grown considerably and has witnessed the creation of an international network of arbitral institutions and activity which has resulted in the ever increasing usefulness of the arbitral process to resolve international commercial disputes. The Western Hemisphere has been no exception.

I. The Inter-American Commercial Arbitration Commission

The IACAC has long enjoyed close relations with the Organization of American States (OAS), whose predecessor organization enacted a resolution at the Conference of American States meeting in Montevideo, Uruguay in 1933.⁸ That resolution

Chile, Colombia, Cuba, Ecuador, Guatemala, Haiti, Mexico, Panama, Trinidad, Tobago, and Uruguay. A chart of the countries that have ratified or acceded to the New York Convention appears in Appendix II of this Article.

4. *Opened for signature* Jan. 30, 1975, OAS/Ser.A/20 (SEPF), reprinted in 14 I.L.M. 336 (1975) [hereinafter cited as Inter-American Convention]. The text of the Inter-American Convention is reprinted in Appendix I of this Article.

5. See Appendix II.

6. See *infra* notes 44-48 and accompanying text.

7. Message from the President of the United States transmitting the Inter-American Convention on International Commercial Arbitration. S. Treaty Doc. No. 12, 97th Cong., 1st Sess. (1981).

8. Resolution of Dec. 23, 1933, Seventh International Conference of American States, Montevideo, Uruguay, reprinted in Norberg, *General Introduction to Inter-American Commercial Arbitration* in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 5-6 (P. Sanders ed. 1984).

served as the basis for the establishment of the IACAC in 1934.

The IACAC has its administrative office in the Secretariat building of the OAS in Washington, D.C.; it has access to the OAS communication system, including the telex; it has a network of national sections or representatives in each country throughout the Western Hemisphere; and it is actively organizing and administering international commercial arbitrations in New York City, Washington, D.C., and Rio de Janeiro. The IACAC has liaison relations with globally-oriented groups, such as the International Council for Commercial Arbitration of The Hague, the International Chamber of Commerce in Paris, the Foreign Trade Arbitration Commissions of the Governments of the USSR in Moscow and the People's Republic of China in Beijing, the Indian Council on Arbitration, and the Japanese Arbitration Association.

In November, 1983, the Thirteenth Regular Session of the OAS General Assembly, held in Washington, D.C., adopted a resolution recognizing the usefulness of the inter-American commercial arbitration process, recommending that the member states disseminate information about the process, and instructing the Secretariat of the Inter-American Economic and Social Council to examine the role of international commercial arbitration in facilitating inter-American commerce.⁹ In August, 1984, the Inter-American Economic and Social Council, at the Nineteenth Annual Meeting at the Ministerial Level, held in Santiago, Chile, approved a resolution to request that the IACAC compile, translate, and publish the laws of the OAS member states on arbitration proceedings and the execution of agreements on arbitral awards.¹⁰

Article three of the Inter-American Convention,¹¹ in effect, designates the IACAC as the chosen instrument in the Western Hemisphere for administering international commercial arbitrations. The OAS and the Inter-American Development Bank now regularly include the IACAC arbitration clause in selected contracts. The Association of Ibero-American Chambers of Commerce and the IACAC have signed an agreement to cooperate in

9. OAS/Ser. P, AG/Com. II/Doc. 2/83.

10. OAS/Ser. H/H.42, CIES/3992.

11. Inter-American Convention, *supra* note 4, art. 3, reprinted in Appendix I.

furthering the use of the arbitration process to resolve international commercial disputes in the Americas.¹²

The government of Mexico has replaced its former law on the transfer of technology (originally adopted in 1972) and has provided for the contractual submission of disputes to international arbitration as an alternative to providing that Mexican laws and courts shall govern such contracts.¹³ The IACAC arbitration clause has been included in at least two technology-transfer contracts signed since the new law became effective. Additionally, the government of Mexico's Petroleos Mexicanos (PEMEX) has included an IACAC clause in a contract with a United States oil company and the Mexican government is considering including an IACAC clause in an international insurance contract to underwrite the risks of putting a Mexican satellite into orbit.¹⁴

If inter-American commercial arbitration had at one time been a unicorn, it gives strong evidence of now being a beast of burden. This Article will discuss the recent history of these developments and the prospects for the future of the inter-American commercial arbitration.

II. The History of Inter-American Commercial Arbitration

Latin American legal scholars and jurists interested in private international law had considered the subject of international commercial arbitration and the enforcement of foreign arbitral awards in the Treaties of Montevideo of 1889¹⁵ and 1940¹⁶

12. Agreement between the Inter-American Commercial Arbitration Commission and the Association of Ibero-American Chambers of Commerce, signed in Guayaquil, Ecuador, October 30, 1984 (on file with the IACAC).

13. See Law on the Registration of the Transfer of Technology and the Use and Exploitation of Patents and Trademarks, *Diario Oficial*, Dec. 30, 1972, as amended Dec. 29, 1981, art. 16(IV). For an English translation of the 1972 version of the law, see 12 *I.L.M.* 421 (1973). See generally Hyde & Ramírez de la Corte, *Mexico's New Transfer of Technology and Foreign Investments Laws — To What Extent Have the Rules Changed?*, 10 *INT'L LAW.* 231 (1976) (discussing the 1972 technology transfer law).

14. Conversations by the author with counsel for a U.S. oil company negotiating with PEMEX and with U.S. counsel for the Government of Mexico negotiating insurance coverage.

15. Treaty Concerning the Union of South American States in Respect of Procedural Law, Jan. 11, 1889, O.A.S.T.S. No. 9 [hereinafter cited as 1889 Montevideo Treaty]. The full text of the 1889 Montevideo Treaty is reprinted in *Textos de los Tratados de Montevideo Sobre Derecho Internacional Privado 1889, 1939 y 1940*, Wash-

as well as in the Bustamante Code of Private International Law of 1928.¹⁷ Title III, articles five through seven of the Montevideo Treaty of 1889 provided that foreign arbitral awards in civil and commercial matters would be enforced in a signatory state if the award had been made by a tribunal that was in the international field. Additional requirements for enforcement were that the award had the character of a final judgment, and was considered as *res judicata* in the country in which it was rendered; that the defendant had been legally summoned and represented or that he was declared to be in default pursuant to the laws of the country where the action was instituted; and that the award was not contrary to the public policy of the country in which it was to be enforced. To request enforcement of an award, the following documents were required: a complete copy of the arbitrator's decision, a copy of all the papers necessary to prove the identity of the parties cited, an authenticated copy of the judicial decree declaring that the award had the character of a final judgment and was considered as *res judicata*, and a copy of the laws upon which the decree was based. Finally, the character of the arbitrator's award and the enforcement proceedings were determined by the law of procedure of the country in which execution was demanded. The Treaty of Montevideo of 1889 was ratified by Argentina, Bolivia, Paraguay, Peru, Uruguay, acceded to by Colombia and signed by Brazil and Chile, both of whom did not ratify.¹⁸ In 1940, the Latin American countries met again in Montevideo and a treaty similar to that of 1889 was signed by

ington, General Secretariat of the OAS, 1973. The articles of the 1889 Montevideo Treaty dealing with arbitration are reprinted in English in 2 REGISTER OF TEXTS OF CONVENTIONS AND OTHER INSTRUMENTS CONCERNING INTERNATIONAL TRADE LAW 5 (1973) [hereinafter cited as U.N. REGISTER OF TEXTS].

16. Treaty on International Procedural Law, Mar. 19, 1940, O.A.S.T.S. No. 9 [hereinafter cited as 1940 Montevideo Treaty]. The articles of the 1940 Montevideo Treaty dealing with arbitration are reprinted in English in 2 U.N. REGISTER OF TEXTS, *supra* note 15, at 21.

17. Convention on Private International Law, Feb. 20, 1928, 86 L.N.T.S. 246 No. 1930 (1929) [hereinafter cited as Bustamante Code]. The articles dealing with arbitration of the Bustamante Code are reprinted in English in 2 U.N. REGISTER OF TEXTS, *supra* note 15, at 18.

The Code was negotiated during the Sixth Inter-American Conference and was signed by the U.S. delegation led by Charles Evans Hughes, Esq., but was not ratified by the United States.

18. See Appendix II.

Argentina, Bolivia, Brazil, Colombia, Paraguay, Peru, and Uruguay and was subsequently ratified by Argentina, Paraguay, and Uruguay.¹⁹

Continuing interest in international commercial arbitration and the enforcement of foreign arbitral awards was manifested at the Havana Conference of 1928 when the countries of Latin America promulgated a major revision of the treaties of private international law, known as the Bustamante Code. Articles 423 through 433 dealt with commercial arbitration and provided for the reciprocal enforcement among the signatory countries of foreign arbitral awards. That Code was ratified by Bolivia, Brazil, Chile, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, and Peru.²⁰ Venezuela also approved the Code but specifically excepted the enforcement of foreign arbitral awards.

Although the United States participated in the Havana Conference, it never became a party to the treaties. However, commercial entities in the United States had continually recognized the need for resolving the inter-American commercial disputes by arbitration. At the First Pan American Financial Conference in 1915,²¹ the United States Chamber of Commerce initiated a series of bilateral agreements to resolve disputes through commercial arbitration. The first of these bilateral agreements was between the United States Chamber of Commerce and the Chamber of Commerce of Argentina. By 1922, the United States Chamber of Commerce had signed eight such bilateral agreements. By 1931, there was interest in inquiring into the use of a system of arbitration for the settlement of trade disputes. The Seventh International Conference of American States, meeting in Montevideo, Uruguay on December 23, 1933, pursuant to a report recommending the development of such an arbitration system, adopted a resolution that provided:

That with a view to establishing even closer relations among the commercial associations of the Americas entirely independent of official control, an inter-American commercial agency be ap-

19. *Id.*

20. *Id.*

21. *Actas del Primer Congreso Fianciero Panamericano* 325-26 (Washington, D.C., May 24-29, 1915) (on file in the library of the O.A.S.).

pointed in order to represent the commercial interest of all republics and to assume, as one of its most important functions, the responsibility of establishing an inter-American system of arbitration.²²

The Pan American Union requested that the AAA and the Commission on Commerce of the Inter-American Council for Inter-American Relations establish this arbitration system. In 1934, the IACAC came into being.²³

The OAS felt that the international arbitration process needed further definition. A model law on commercial arbitration was promulgated at the 1956 Mexico City meeting of the Inter-American Council of Jurists²⁴ but it was not enacted by any state in the Americas. In 1967, at a meeting of the Inter-American Juridical Committee held in Rio de Janeiro, a draft was adopted of an Inter-American Convention on International Commercial Arbitration.²⁵ The Committee recognized that a convention was more likely to be accepted than a model law. The Committee's judgment proved to be correct when the final version of an Inter-American Convention on International Arbitration was promulgated in 1975 at the conclusion of the First OAS Inter-American Specialized Conference on Private International Law (CIDIP 1).²⁶

The Inter-American Juridical Committee reviewed its earlier draft and approved its submission to CIDIP 1, which then assigned the draft to a working group for consideration. The working group consisted of delegates from Brazil, the United States, and Mexico, with a delegate from Chile participating in the discussions and a delegate from Panama monitoring the

22. Resolution of Dec. 23, 1933, *supra* note 8, at 6.

23. The November 3, 1976 letter from the President of IACAC to the Secretary-General of the OAS is on file with the Washington office of the IACAC. This letter reviews the history of the relationship between the OAS and the IACAC and recognizes that the establishment of the IACAC was a consequence of the Conference of American States.

24. Draft Uniform Law on Inter-American Commercial Arbitration, Resolution VIII of the Third Meeting of the Inter-American Council of Jurists, Mexico City, Mexico, 1956.

25. Report of the Inter-American Juridical Committee on the Draft Convention on International Commercial Arbitration, OAS/SER.I/VI.1, Feb 19, 1968.

26. Organization of American States, Inter-American Specialized Conference on Private International Law (CIDIP 1) held in Panama, Republic of Panama, Jan. 14-29, 1975.

work. The working- group draft was then discussed in detail during three sessions of the Inter- American Juridical Committee, which was responsible for preparing the draft that was submitted to a plenary session. The final text of the convention was approved by voting on each article separately.²⁷

III. The Inter-American Convention on International Commercial Arbitration

Under general Latin American jurisprudence, it was not possible to enter into an agreement to arbitrate a future dispute. Article one of the Inter- American Convention has changed this by providing for the arbitration of "any differences that may arise or have arisen" between the parties.²⁸ Under earlier legislation, an agreement to arbitrate had to be in the form of a public document subscribed before a notary public, (an *escritura publica*). The Inter-American Convention reflects the more modern practice, used in the New York Convention,²⁹ by providing that an agreement to arbitrate can be evidenced by an "instrument, signed by the parties, or in the form of an exchange of letters, telegrams or telex communications."³⁰

Under former practice, it was not possible to delegate the appointment of an arbitrator to a third party. Article two of the Inter-American Convention now authorizes parties to delegate to a third party, whether a natural or juridical person, the appointment of arbitrators.³¹ In addition, arbitrators may be foreigners, thus changing the statutory law in some countries which previously had prohibited aliens or non-residents from acting as arbitrators.³²

Although parties may, of course, agree on any rules governing the procedure for their arbitration, article three of the Inter-American Convention provides that, in the absence of an

27. The proceedings of the Inter-American Convention, including a detailed discussion of the debates during the Convention, are reported in Spanish in 1-2 ACTAS Y DOCUMENTOS DE LA CONFERENCIA ESPECIALIZADA INTERAMERICANA SOBRE DERECHO INTERNACIONAL PRIVADO.

28. Inter-American Convention, *supra* note 4, art. 1, reprinted in Appendix I.

29. New York Convention, *supra* note 2, art. 2(2).

30. Inter-American Convention, *supra* note 4, art. 1, reprinted in Appendix I.

31. Inter-American Convention, *supra* note 4, art. 2, reprinted in Appendix I.

32. *Id.* See, e.g., Commercial Code, art. 2012 (1971) (Colom.).

express agreement, "the arbitration shall be conducted in accordance with the rules of procedure of the Inter-American Commercial Arbitration Commission."³³ Thus, the status of the IACAC is recognized by an international treaty, the only such provision in the world recognizing an international commercial arbitration administrative body. Additionally, after a country has ratified the Inter-American Convention, its domestic procedural rules will be superseded by the rules of the IACAC.

The Rules of Procedure of the IACAC are, in effect, the ad hoc arbitration rules recommended by the United Nations Commission on International Trade Law (UNCITRAL).³⁴ The General Assembly recommended the use of the UNCITRAL Arbitration Rules in 1976.³⁵ In 1977, the executive committee of the IACAC adopted the UNCITRAL Rules with certain changes appropriate for their use in the Western Hemisphere.³⁶ In 1982, UNCITRAL distributed guidelines³⁷ to aid arbitral institutions in interpreting the UNCITRAL Rules.³⁸

33. Inter-American Convention, *supra* note 4, art. 3, reprinted in Appendix I.

34. See UNCITRAL, Report on the Ninth Session, [1976] 7 Y.B. COMM'N INT'L TRADE L. 22, U.N. Doc. A/CN.9/SER.A/1976, reprinted in 2 Y.B. COM. ARB. 161 (ICCA 1977).

35. By resolution, the General Assembly requested the Secretary-General "to arrange for the widest possible distribution of the Arbitration Rules." G.A. Res. 31/98, 31 U.N. GAOR Supp. (No. 39) (99th plen. mtg.) at 182, reprinted in [1977] 8 Y.B. COMM'N INT'L TRADE L. 7, U.N. Doc. A/CN.9/SER.A/1977. See generally Fleischhauer, *UNCITRAL and International Commercial Dispute Settlement*, 38 ARB. J. 9 (Dec. 1983) (discussing UNCITRAL's work in the field of arbitration); Herrmann, *UNCITRAL's Work Towards a Model Law on International Commercial Arbitration*, 4 PACE L. REV. 537 (1984) (discussing the formative stages of this Model Law); Herrmann, *The Contribution of UNCITRAL to the Development of International Trade*, in 2 THE TRANSNATIONAL LAW OF INTERNATIONAL COMMERCIAL TRANSACTIONS 35 (N. Horn & C. Schmitthoff eds. 1982) (discussing the activities of UNCITRAL in arbitration and other fields); Suy, *Achievements of the United Nations Commission on International Trade Law*, 15 INT'L LAW. 139 (1981).

36. On May 6, 1977, the executive committee of the IACAC adopted the UNCITRAL Rules, to be effective January 1, 1978, with changes appropriate for their use in the Western Hemisphere. The Report of the Secretary-General of UNCITRAL to the Ninth Session, U.N. Doc. A/CN.9/112, reprinted in [1976] 7 Y.B. COMM'N INT'L TRADE L. 157, U.N. Doc. A/CN.9. Ser.A/1976, discusses in detail the rationale for each of the UNCITRAL rules.

37. Recommendations to Assist Arbitral Institutions and Other Interested Bodies with Regard to Arbitrations under the UNCITRAL Arbitration Rules, Report of the Fifteenth Session, 37 U.N. GAOR Annex 1 (Agenda Item 6), at 36, U.N. Doc. A/CN.9/222 (1982).

38. UNCITRAL, Report of the Fifteenth Session, 37 U.N. GAOR Supp. (No. 17) at

The Inter-American Convention provides in article 4 that an arbitral award shall have the force of a final judicial judgment.³⁹ The recognition and execution of an award may be ordered in the same manner as that of judgments handed down by ordinary national or foreign courts. Additionally, the Inter-American Convention reflects the language of the New York Convention in providing that enforcement must be done in accordance with the procedural laws of the country of execution as well as the provisions of international treaties.⁴⁰

Article five relates to remedies that may be taken against an arbitral award and contains almost verbatim the language used in article five of the New York Convention.⁴¹ Article six was also taken from the New York Convention and provides for the postponement of a decision on the execution of an arbitral award and the obligation of an objecting party to provide appropriate guarantees.⁴²

Article seven provides for signature and ratification by the member states of the OAS, but article nine adds that "this Convention shall remain open for accession by any other state."⁴³ Thus, countries outside of the Western Hemisphere enjoying trade relations with the Latin American world have been given the opportunity of acceding to the Inter-American Convention.

IV. The United States and the Inter-American Convention on International Commercial Arbitration

On June 9, 1978, the United States signed the Inter-American Convention and on June 15, 1981, President Ronald Reagan sent a message along with the text of the Inter-American Convention to the Senate,⁴⁴ where it was read for the first time and referred to the Committee on Foreign Relations. A bill⁴⁵ to im-

19-20, U.N. Doc. A/37/17 (1982). These recommendations were sent to governments, arbitral institutions, and chambers of commerce around the world.

39. Inter-American Convention, *supra* note 4, art. 4, reprinted in Appendix I.

40. *Id.*

41. *Id.* art. 5.

42. *Id.* art. 6.

43. *Id.* art. 7, 9.

44. See *supra* note 7.

45. S. 2119, 97th Cong., 2d Sess., 128 CONG. REC. 989-90 (1982). The bill provides in relevant part:

plement the United States' ratification of the Inter-American

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title 9, United States Code, is amended by adding:

CHAPTER 3. INTER-AMERICAN CONVENTION ON INTERNATIONAL COMMERCIAL ABRITRATION . . .

§ 301. Enforcement of Convention

The Inter-American Convention on International Commercial Arbitration of January 30, 1975, shall be enforced in the United States courts in accordance with this chapter.

§ 302. Incorporation by reference

The provisions of chapter 2, sections 202, 203, 204, 205, and 207 shall apply to this chapter as if specifically set forth herein, except that for the purposes of this chapter "the Convention" shall mean the Inter-American Convention.

§ 303. Order to compel arbitration; appointment of arbitrators; locale

A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States.

The court may also appoint arbitrators in accordance with the provisions of the agreement. In the event the agreement does not make provision for the place of arbitration or the appointment of arbitrators, the court shall direct that the arbitration shall be held and the arbitrators be appointed in accordance with article 3 of the Inter-American Convention.

§ 304. Awards falling under Inter-American Convention

Recognition and enforcement of foreign arbitral decisions or awards under this chapter shall apply only to those decisions or awards made in the territory of another contracting State.

§ 305. Relationship between the Inter-American Convention and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958

When the requirements for application of both the Inter-American Convention and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, are met, determination as to which Convention applies shall, unless otherwise expressly agreed, be made as follows:

(1) If a majority of the parties to the arbitration agreement are citizens of a State or States that have ratified or acceded to the Inter-American Convention and are member States of the Organization of American States, the Inter-American Convention shall apply.

(2) In all other cases the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall apply.

§ 306. Applicable rules of Inter-American Commercial Arbitration Commission

(a) For the purposes of this chapter the rules of procedure of the Inter-American Commercial Arbitration Commission referred to in article 3 of the Inter-American Convention shall, subject to subsection (b) of this section, be those rules as promulgated by the Commission on January 1, 1982.

(b) In the event the rules of procedure of the Inter-American Commercial Arbitration Commission are modified or amended in accordance with the procedures for amendment of the rules of the said Commission, the Secretary of State, by regulation in accordance with section 553 of title 5, United States Code, consistent with the aims and purposes of this Convention, may prescribe that such modifications or amendments shall be effective for purposes of this chapter.

Convention was sent to the Senate and to the House of Representatives, but was not enacted. New legislation is in the process of being cleared by the Office of Management and Budget for introduction to the Ninety-ninth Congress. It is anticipated that the Senate will give its advice and consent to ratification with three reservations: foreign arbitral awards will only be enforced if they are made in another contracting state;⁴⁶ the New York Convention will apply instead of the Inter-American Convention unless certain conditions are met;⁴⁷ and the United States must accept future amendments to the Inter-American Rules of Procedure.⁴⁸

The bill amends title nine of the United States Code by adding a new chapter, chapter three, which implements the adoption of the Inter-American Convention.⁴⁹ As amended, title nine would contain three chapters: chapter one, the original Federal Arbitration Act;⁵⁰ chapter two, the implementing legislation for the New York Convention,⁵¹ and chapter three, the implementing legislation for the Inter-American Convention.

Section 301 of title nine would parallel section 201 of the implementing legislation for the New York Convention.⁵² Sec-

§ 307. Chapter 1; residual application

Chapter 1 applies to actions and proceedings brought under this chapter to the extent chapter 1 is not in conflict with this chapter or the Inter-American Convention as ratified by the United States.

SEC. 2. Title 9, United States Code, is further amended by adding to the table of contents at the beginning a new subheading as follows:

3. Inter-American Convention on International Commercial Arbitration
301.

SEC. 3. This Act shall be effective upon the entry into force of the Inter-American Convention on International Commercial Arbitration of January 30, 1975, with respect to the United States.

The draft of the implementing legislation and the article by article comments were initially prepared by a special committee of the American Arbitration Association, chaired by Gerald Aksen, Esq., and with the cooperation of the Legal Adviser's Office of the Department of State. The drafts served as the basis for the legislation and comment sent to the Senate by the President and the Department of State.

46. See *infra* text accompanying note 69.

47. See *infra* text accompanying note 70.

48. See *infra* text accompanying notes 71-72.

49. S. 2119, *supra* note 21, §§ 301-307.

50. 9 U.S.C. §§ 1-14 (1982).

51. *Id.* §§ 201-208.

52. Compare S. 2119, *supra* note 21, § 301 with 9 U.S.C. § 201 (1982).

tion 302 incorporates sections 202,⁵³ 203,⁵⁴ 204,⁵⁵ 205,⁵⁶ and 207⁵⁷ of the implementing legislation for the New York Convention.

53. 9 U.S.C. § 202 (1982). The section provides:

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of the title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

Id.

54. *Id.* § 203. The section provides:

An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

Id.

55. *Id.* § 204. The section provides:

An action or proceeding over which the district courts have jurisdiction pursuant to section 203 of this title may be brought in any such court in which save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought, or in such court for the district and division which embraces the place designated in the agreement as the place of arbitration if such place is within the United States.

Id.

56. *Id.* § 205. The section provides:

Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.

Id.

57. *Id.* § 207. The section provides:

Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

Id.

The New York Convention and the Inter-American Conventions do not differ in a way that calls for different measures of implementation in the areas covered by these sections. The incorporation of section 202, which provides that an arbitration agreement or arbitral award arising out of a legal relationship "which is considered as commercial" falls under the New York Convention,⁵⁸ would provide the basis for a broad definition of the term "commercial" for purposes of the Inter-American Convention. The Inter-American Convention itself provides no definition of "commercial" but it is the understanding of the United States that trade, investment, and other business and financial activities which bear on "foreign commerce" are considered "commercial" and are thus within the purview of the Inter-American Convention. The incorporation of section 202 would also clarify that the Inter-American Convention, like the New York Convention, shall not apply to an arbitral agreement or award arising out of a legal relationship that is entirely between citizens of the United States, unless there is a reasonable foreign element in the relationship as defined in Section 202.⁵⁹

The incorporation of sections 203⁶⁰ and 204⁶¹ would extend the same jurisdiction and venue provisions of the United States District Courts to actions or proceedings falling under the Inter-American Convention as those that apply to proceedings falling under the New York Convention. Similarly, the incorporation of section 205 would give defendants the right to remove actions or proceedings relating to arbitration agreements or awards falling under the Inter-American Convention from state courts to United States District Courts, as is now the case for disputes falling under the New York Convention.

With the incorporation of section 207,⁶² the three-year limitation period for application to a court for an order confirming an arbitral award that applies to awards falling under the New York Convention would also apply to awards falling under the Inter-American Convention. Section 207 would also require the

58. *Id.* § 202. *See supra* note 53.

59. 9 U.S.C. § 202 (1982). *See supra* note 53.

60. 9 U.S.C. § 203 (1982). *See supra* note 54.

61. 9 U.S.C. § 204 (1982). *See supra* note 55.

62. 9 U.S.C. § 207 (1982). *See supra* note 57.

court to confirm the award "unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention."⁶³ Those grounds are specified in article five of the Inter-American Convention.⁶⁴

The first paragraph of section 303⁶⁵ repeats section 206,⁶⁶ of title nine and would provide that a court may direct that arbitration be held in accordance with the agreement at any place provided for in the agreement, whether inside or outside of the United States, and that the court may also appoint arbitrators in accordance with the provisions in the agreement. The second paragraph of section 303 is new and would provide that in the absence of an agreement between the parties a court shall direct that the arbitration be held and the arbitrators be appointed in accordance with article three of the Inter-American Convention.⁶⁷ Thus, pursuant to article three, such disputes would be settled by the IACAC Rules of Procedure, which are basically the same as the UNCITRAL Arbitration Rules.⁶⁸ Neither the Federal Arbitration Act nor the New York Convention contains a comparable provision but instead leaves the choice of rules of procedure to the court in the absence of agreement by the parties. In contrast, the use of the IACAC rules provides a desirable certainty and uniformity in the application of the Inter-American Convention.

Section 304 would require reciprocity from a country before the United States will enforce that country's arbitration award.⁶⁹ This rule of reciprocity applies to the New York Convention and it is anticipated that the same reservation will be included in the legislation implementing the adoption of the Inter-American

63. 9 U.S.C. § 207 (1982). See *supra* note 57.

64. Inter-American Convention, *supra* note 4, art. 5, reprinted in Appendix I.

65. S. 2119, *supra* note 14, § 303.

66. 9 U.S.C. § 206 (1982). The section provides:

A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement.

Id.

67. S. 2119, *supra* note 14, § 303.

68. For a discussion of the UNCITRAL Rules, see *supra* notes 34-38 and accompanying text.

69. S. 2119, *supra* note 14, § 304.

Convention.

Section 305 would deal with potential conflicts between the New York Convention and the Inter-American Convention.⁷⁰ Given the substantial similarity between these two conventions, the issue is not expected to be of great consequence. Nevertheless, the resolution of possible conflicts should be explicitly provided for. Thus, section 305 would provide that when both conventions are applicable to a particular case, the United States will be bound by and apply the provisions of the Inter-American Convention only if a majority of the parties to the arbitration agreement are citizens of a state or states that have ratified or acceded to the Inter-American Convention and are citizens of OAS member states. In other cases, the United States will be bound by and apply the New York Convention. Section 305 would make it clear that, when both conventions are potentially applicable, both parties must be citizens of OAS member states before the Inter-American Convention supersedes the New York Convention.

Section 306 is necessary in order to implement article three of the Inter-American Convention and would specify that the IACAC rules to be used when the parties fail to agree are those rules promulgated by the IACAC in 1982.⁷¹ Section 306 would provide that any amendments to the 1982 IACAC rules must be officially reviewed and approved by the United States before they will be applied by the United States. This reservation is thought to be desirable because the IACAC is a private, non-governmental body. Section 306 also would provide the procedure to be used for reviewing and approving amendments to the 1982 IACAC Rules.⁷² This procedure provides a simple and efficient mechanism for soliciting the comments of interested and expert groups and individuals in order to provide an informed basis for official judgment and determination.

In his letter accompanying the text of the Inter-American Convention, President Ronald Reagan noted that ratification of the Inter-American Convention had been recommended by the AAA, the American Bar Association, the United States Chamber

70. *Id.* § 305.

71. *Id.* § 306.

72. *Id.*

of Commerce, the Association of American Chambers of Commerce in Latin America, the American Foreign Law Association and a number of state and local bar associations. He also noted that there did not seem to be opposition to the ratification. Thus, the President recommended that the Senate give its advice and consent to ratification, subject to the three reservations which were described in the accompanying report of the Secretary of State.

After the Office of Management and Budget has reviewed the bill to implement the Inter-American Convention, it will send it to the Senate and the House of Representatives together with a section-by-section analysis similar to the one set forth in this Article. Presumably, the Senate Foreign Relations Committee will then hold a public hearing on the proposed bill.

V. Conclusion

The use of international commercial arbitration has been greatly enhanced in the forums of the world. The English⁷³ and the French⁷⁴ have enacted new legislation to enhance the attractiveness of England and France as the situs for international commercial arbitration. The AAA has organized the World Arbitration Institute for, among other functions, publicizing the advantages of conducting international commercial arbitration in New York City. The Swiss have refurbished their image, and the Stockholm Chamber of Commerce has published materials explaining the usefulness of arbitrating in Stockholm. Additional forums for international arbitration include Moscow, New Delhi, Tokyo, Kuala Lumpur, Cairo and Lagos.

In the Americas, apart from the long-standing expertise of the AAA in New York City, lawyers and businessmen in the Coral Gables area of Miami have prepared materials relating to a proposed Florida International Arbitration Act.⁷⁵ The Act will be introduced in the upcoming session of the Florida legislature, commencing in April. The proponents of the legislation are opti-

73. Arbitration Act 1979, ch. 42, §§ 1-9.

74. Decree No. 81-500, dated May 12, 1981, 1981 *Journal Officiel de la République Française* at 1398-1406.

75. See Loumiet, Swan & O'Naghten, *The Proposed Florida International Arbitration Act*, 16 U. MIAMI INTER-AMERICAN L. REV. (1985).

mistic that it will be enacted during that session.

Latin America is keeping pace with this activity. For at least twenty years the Stock Exchange in Buenos Aires has had a standing tribunal for administering domestic and international arbitration. In the field of international commercial arbitration, this Stock Exchange Tribunal coordinates its activities with the Chamber of Commerce in Buenos Aires. In Santiago, the Chamber of Commerce provides arbitration facilities. In Rio de Janeiro, there is the Brazilian Arbitration Center which represents the interests of the IACAC.

The Chamber of Commerce in Bogotá, Colombia, provides facilities for international commercial arbitration and also acts as the secretariat for the Association of Ibero-American Chambers of Commerce, with which the IACAC has an agreement to cooperate throughout the hemisphere. Panama has recently ratified the New York Convention, supplementing its ratification of the Inter-American Convention, and lawyers and businessmen in Panama look forward to making their country a focal point for international commercial arbitration.

The businessmen and lawyers of Mexico City, noting that their government had already ratified the New York and the Inter-American Conventions, have recently organized the Center for Commercial Arbitration (CEMAC) with the support of the National Chamber of Commerce of Mexico City, the Mexican Bar Association, and other leading industrial and commercial associations. The International Chamber of Commerce (ICC) has recently made a special effort to utilize facilities in Mexico City for the administration of ICC arbitrations in accordance with its rules.

Inter-American commercial arbitration may have been a process which has taken a good many years to blossom but every evidence exists that it has a bright future.

Appendix I

INTER-AMERICAN CONVENTION ON INTERNATIONAL COMMERCIAL ARBITRATION

The Governments of the Member States of the Organization of American States, desirous of concluding a convention on international commercial arbitration, have agreed as follows:

Article 1

An agreement in which the parties undertake to submit to arbitral decision any differences that may arise or have arisen between them with respect to a commercial transaction is valid. The agreement shall be set forth in an instrument signed by the parties, or in the form of an exchange of letters, telegrams, or telex communications.

Article 2

Arbitrators shall be appointed in the manner agreed upon by the parties. Their appointment may be delegated to a third party, whether a natural or juridical person.

Arbitrators may be nationals or foreigners.

Article 3

In the absence of an express agreement between the parties, the arbitration shall be conducted in accordance with the rules of procedure of the Inter-American Commercial Arbitration Commission.

Article 4

An arbitral decision or award that is not appealable under the applicable law or procedural rules shall have the force of a final judicial judgment. Its execution or recognition may be ordered in the same manner as that of decisions handed down by national or foreign ordinary courts, in accordance with the procedural laws of the country where it is to be executed and the provisions of international treaties.

Article 5

1. The recognition and execution of the decision may be refused, at the request of the party against which it is made, only if such party is able to prove to the competent authority of the State in which recognition and execution are requested:

a. That the parties to the agreement were subject to some

incapacity under the applicable law or that the agreement is not valid under the law to which the parties have submitted it, or, if such law is not specified, under the law of the State in which the decision was made; or

b. That the party against which the arbitral decision has been made was not duly notified of the appointment of the arbitrator or of the arbitration procedure to be followed, or was unable, for any other reason, to present his defense; or

c. That the decision concerns a dispute not envisaged in the agreement between the parties to submit to arbitration; nevertheless, if the provisions of the decision that refer to issues submitted to arbitration can be separated from those not submitted to arbitration, the former may be recognized and executed; or

d. That the constitution of the arbitral tribunal or the arbitration procedure has not been carried out in accordance with the terms of the agreement signed by the parties or, in the absence of such agreement, that the constitution of the arbitral tribunal or the arbitration procedure has not been carried out in accordance with the law of the State where the arbitration took place; or

e. That the decision is not yet binding on the parties or has been annulled or suspended by a competent authority of the State in which, or according to the law of which, the decision has been made.

2. The recognition and execution of an arbitral decision may also be refused if the competent authority of the State in which the recognition and execution is requested finds:

a. That the subject of the dispute cannot be settled by arbitration under the law of that State; or

b. That the recognition or execution of the decision would be contrary to the public policy ("ordre public") of that State.

Article 6

If the competent authority mentioned in Article 5.1.e has been requested to annul or suspend the arbitral decision, the authority before which such decision is invoked may, if it deems it appropriate, postpone a decision on the execution of the arbitral decision and, at the request of the party requesting execution, may also instruct the other party to provide appropriate guaranties.

Article 7

This Convention shall be open for signature by the Member States of the Organization of American States.

Article 8

This Convention is subject to ratification. The instruments of ratification shall be deposited with the General Secretariat of the Organization of American States.

Article 9

This Convention shall remain open for accession by any other State. The instruments of accession shall be deposited with the General Secretariat of the Organization of American States.

Article 10

This Convention shall enter into force on the thirtieth day following the date of deposit of the second instrument of ratification.

For each State ratifying or acceding to the Convention after the deposit of the second instrument of ratification, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.

Article 11

If a State Party has two or more territorial units in which different systems of law apply in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification or accession, declare that this Convention shall extend to all its territorial units or only to one or more of them.

Such declaration may be modified by subsequent declarations, which shall expressly indicate the territorial unit or units to which the Convention applies. Such subsequent declarations shall be transmitted to the General Secretariat of the Organization of American States, and shall become effective thirty days after the date of their receipt.

Article 12

This Convention shall remain in force indefinitely, but any of the States Parties may denounce it. The instrument of denunciation shall be deposited with the General Secretariat of the Organization of American States. After one year from the date of deposit of the instrument of denunciation, the Convention

shall no longer be in effect for the denouncing State, but shall remain in effect for the other States Parties.

Article 13

The original instrument of this Convention, the English, French, Portuguese and Spanish texts of which are equally authentic, shall be deposited with the General Secretariat of the Organization of American States. The Secretariat shall notify the Member States of the Organization of American States and the States that have acceded to the Convention of the signatures, deposits of instruments of ratification, accession, and denunciation as well as of reservations, if any. It shall also transmit the declarations referred to in Article 11 of this Convention.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their respective Governments, have signed this Convention.

DONE AT PANAMA CITY, Republic of Panama, this thirtieth day of January one thousand nine hundred and seventy-five.

Appendix II

Countries of the Western Hemisphere that Ratified or Acceded
to Treaties Relating to International Commercial Arbitration

| Country | Montevideo ¹ 1889 | Havana ² 1928 (Bustamante Code) | Montevideo ³ 1940 | U.N. ⁴ (N.Y. 1958) | IACIA ⁵ (Panama 1975) |
|-----------------------|---------------------------------|---|---------------------------------|----------------------------------|-------------------------------------|
| Argentina | X | | X | | |
| Bolivia | X | X | | | |
| Brazil ⁶ | | X | | | |
| Chile | | X | | X | X |
| Colombia | X | | | X | |
| Costa Rica | | X | | | X |
| Cuba | | X | | X | |
| Dominican Republic | | X | | | |
| Ecuador | | X | | X | |
| El Salvador | | X | | | X |
| Guatemala | | X | | X | |
| Haiti | | X | | X | |
| Honduras | | X | | | X |
| Mexico | | | | X | X |
| Nicaragua | | X | | | |
| Panama | | X | | X | X |
| Paraguay | X | | X | | X |
| Peru | X | X | | | |
| Trinidad & Tobago | | | | X | |
| United States | | | | X | |
| Uruguay | X | | X | X | X |
| Venezuela | | X | | | |

1. Treaty Concerning the Union of South American States in Respect of Procedural Law, Jan. 11, 1889, O.A.S.T.S. No. 9. The full text of the 1889 Montevideo Treaty is reprinted in *Textos de los Tratados de Montevideo Sobre Derecho Internacional Privado 1889, 1939 y 1940*, Washington, General Secretariat of the OAS, 1973. The articles of the 1889 Montevideo Treaty dealing with arbitration are reprinted in English in 2 U.N. REGISTER OF TEXTS OF CONVENTIONS AND OTHER INSTRUMENTS CONCERNING INTERNATIONAL TRADE LAW 5 (1973) [hereinafter cited as U.N. REGISTER OF TEXTS].

2. Convention on Private International Law, Feb. 20, 1928, 86 L.N.T.S. 246 No. 1930 (1929). The articles dealing with arbitration of the Bustamante Code are reprinted in English in 2 U.N. REGISTER OF TEXTS, *supra* note 1, at 5.

3. Treaty on International Procedural Law, Mar. 19, 1940, O.A.S.T.S. No. 9 [hereinafter cited as 1940 Montevideo Treaty]. The articles of the 1940 Montevideo Treaty dealing with arbitration are reprinted in English in 2 U.N. REGISTER OF TEXTS, *supra* note 1, at 21.

4. United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards, opened for signature June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38.

5. International American Convention on International Commercial Arbitration, opened for signature Jan. 30, 1975, OAS/Ser.A/20 (SEPP), reprinted in 14 I.L.M. 336 (1975).

6. Brazil also ratified the European Convention on International Arbitration (1923).